nistrator. The grant of probate to the executor does not confer upon him any title to property which the testator had no right to dispose of. It only perfects the representative title of the executor to the property, which did belong to the testator, and over which he had a disposing power. It does not prejudice the rights of any person who claims any such property. Indeed, no person can make any title or attempt to enforce his right to any of the testator's property unless probate of the will has first been obtained.

The position in India would appear to be that no probate or letters of administration can be granted in respect of joint family property. But where such property stands in the name of the manager or other members of the family, letters of administration may be granted to the surviving coparcener or his heir to the legal estate in that property. This constantly happens in the case of shares in a limited company (see *Mulla* on Hindu Law 14th Edn. page 451). As I have stated above, in the present case the whole of the immovable property belonging to the joint Hindu family stands registered in the name of the deceased. It is therefore necessary for that property to be vested in the executor appointed by the deceased by his will before it can be distributed to the persons rightly entitled to it. To enable any person claiming any part of such property it will be necessary to restrict the powers of the executor to deal with it without an order of court.

Section 22 of the Probate and Administration Act, 1959 provides that "where a person dies, leaving property in which he had no beneficial interest on his own account, and does not leave a representative who is able and willing to act, letters of administration, limited to that property, may be granted to the person beneficially interested in the property, or to some other person on his behalf." Section 24 of the same Act provides that "a grant of probate or letters of administration may be made subject to such exception as the will or the circumstances of the case require; and in any such case a further grant may be made of the part of the estate so excepted." From the provisions of these two sections it is clear that the appellant has a better right to be appointed as the deceased's personal representative. There is no doubt about the deceased's will being a perfectly valid will. A grant of probate in respect of that will must therefore be granted to the appellant but subject to the proviso that he shall have no power to dispose of or distribute any property bequeathed by the will or its proceeds without a further order of court to that effect.

In all the circumstances of the case and for the reasons which I have stated, I would allow the appeal, setting aside the order made by the court below and substituting in its place an order that a grant of probate of the deceased's will be issued to the appellant subject to the proviso that before disposing of or distributing any property bequeathed under the will or the proceeds of such property there shall be an order of court to that effect. The respondent must pay the costs of this appeal and the costs in the court below.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal allowed.

Solicitors: *Gill & Tang; Lovelace & Hastings.*

TAY SENG KENG v. TAY EK SENG CO. SDN. BHD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) August 17 and September 27, 1977]

[Kuala Lumpur — F.C. Civil Appeal No. 4 of 1977]

Practice and Procedure — Contempt — Failure to comply with interim order — Evidence given on affidavits — Proof beyond reasonable doubt.

The appellant who was a manager employed by the respondent company had his services terminated. The respondents brought an action claiming an order to restrain the appellant from remaining in the estate bungalow and requiring him to hand possession of the said bungalow and all furniture, fittings, files and documents. An interim order was obtained by the respondents. Subsequently the bailiff handed over possession of the bungalow and furniture to the respondents' representative. The respondents alleged that the appellant had a number of books and documents and that he had failed to hand them over. A writ for attachment for contempt was applied for and the High Court issued a warrant for committal. The appellant appealed to the Federal Court.

Held, allowing the appeal: (1) the evidence in this case consisted of affidavits from both sides and on a mere consideration of such affidavits it was quite impossible to say that the guilt of the appellant had been proved beyond reasonable doubt;

(2) in all the circumstances the appellant's imprisonment for contempt of court could not be sustained.

Case referred to:-

(1) *In re Bramblevale* [1970] 1 Ch. 128.

FEDERAL COURT.

C. Paramjothy (*Anthony Taye* with him) for the appellant.

R.R. Chelvarajah for the respondents.

Gill C.J. (Malaya) (delivering the judgment of the Court): The appellant was the manager of the respondent company's Chuan Moh San Rubber Estate as well as of their Malacca Head Office. His services as such manager were terminated on June 10, 1974 and June 14, 1974 respectively.

On August 30, 1974 the respondents brought an action in the High Court in Malacca claiming against the appellant, *inter alia*, an order to restrain him from remaining in the estate bungalow and the manager's room and a mandatory order requiring him to hand over possession of the said bungalow and the manager's room together with all furniture and fittings, files and documents including all books of account and keys to safe, drawers, lockers and cupboards etc. On October 4, 1974 they obtained an interim order in the same terms as the substantial orders they were seeking in the action.

The appellant failed to comply with the orders whereupon the bailiff took steps to hand over to the respondent's representative possession of the bungalow and the manager's room and such items of furniture

etc. as were found therein. The respondents then served further notices on the appellant requiring him to comply with the terms of the order. In this connection they sent him a list of documents, books etc. which they alleged were still in the unlawful and wrongful possession of the appellant and/or his servants and/or his agents.

On the appellant failing to respond to these notices, on March 3, 1975 the respondent company moved the court for leave to issue a writ of attachment against the appellant for contempt of court in disobeying the orders made by the court. Numerous affidavits were filed in connection with this motion by both parties. As the appellant had himself taken out a notice of motion on June 3, 1975 for the interim injunction and the mandatory order of October 4, 1974 to be discharged, further affidavits were filed on the filing of this notice of motion. The two motions being connected with each other were heard together.

It was contended on behalf of the appellant before the learned judge that the bailiff had in fact handed over possession of the bungalow and the office to the respondents, and that none of the other items which he was required to deliver were in his possession as he had not removed anything either from the bungalow or from the office. Having considered all the affidavits which were filed, the learned judge came to the conclusion that he was satisfied beyond all reasonable doubt that the listed items were and are still in the appellant's possession and that for reasons best known to him he had wilfully failed and refused to hand them over to the respondent. He therefore found him guilty of contempt. In the event the appellant's application was dismissed, and there was issued against him a warrant of committal which was to lie in court for a month.

The appellant appealed to this court against that order of committal.

It was common ground that the order which was alleged to have been disobeyed by the appellant related to the account books etc. for the period July 1972 to June 1974. The numerous affidavits filed on behalf of the respondents tended to show that these books of account should have been in the possession of the appellant, although there were no positive statements by any of the deponents of those affidavits that the account books in question had been seen with the defendant at about the time that his services as manager were terminated. There was also no evidence in any of the affidavits that the appellant had been seen to remove any of the books of account. The appellant himself had categorically stated in his affidavits that those account books were not in his possession.

At the hearing of the motions before the learned judge the case of *In re Bramblevale Ltd.*[1] was referred to. It was decided in that case by the Court of Appeal in England that where a person is charged with contempt of court, which is an offence of a criminal nature involving the liberty of a subject, his guilt must be proved beyond reasonable doubt. The learned judge, however, took the view that the facts in that case were quite different from the facts in this case, because the appellant in this case had not said that the required items had been destroyed accidently or otherwise. He further took the view that the appellant's mere denial that the account books were not with him and his conduct subsequent to the making of the order showed that he had no intention at all to voluntarily comply with the terms of the said order.

The conduct of the appellant to which the learned judge made reference obviously related to his non-cooperation with the bailiff in the handing over of the bungalow and the office and the items specified in the order. It was contended before us by counsel for the respondents that the appellant was notified of the time when the bailiff would be there and was asked to be present but he chose not to comply with such request. It was further contended that the appellant gave different stories at different times as regards the whereabouts of the books of account, and it was lastly submitted that in view of the affidavits before the learned judge and some other documents, which incidentally were not before us, there were compelling circumstances from which the learned judge could correctly draw the inference that the appellant was in possession of the books of account in question.

Having heard arguments from both sides the view which we took was that the learned judge had decided the whole case solely on the affidavits. It is clear that there were affidavits on both sides, so that on a mere consideration of such affidavits it was quite impossible to say that the guilt of the appellant had been proved with such strictness of proof as is consistent with the test of "beyond reasonable doubt". The order which the appellant was alleged to have failed to comply with was an interim order. The action is yet to be tried for the final orders to be made. In all the circumstances of the case we felt that the appellant's imprisonment for contempt of court could not be sustained. We therefore allowed the appeal and set aside the order of the court below.

Appeal allowed.

Solicitors: *Mah, Kok & Taye; Salt & Co.*

MOHAMED BIN HUSSIN & ANOR. v. HASHIM BIN SAID

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.J.J.) September 7 and November 2, 1977]

[Kuala Lumpur — F.C. Civil Appeal No. 58 of 1977]

Practice and Procedure — Costs — Costs awarded to unsuccessful plaintiff — Discretion — Action of Government as defendant unreasonable — Government Proceedings Ordinance, 1956, ss. 14 and 31 — R.S.C., 1957 O. 65 r. 1.

Armed Forces — Member of — Instance of death or serious injury — Administrative measure — Government Proceedings Ordinance, 1956, s. 14(1)(a) & (b).

Government Proceedings — Member of armed forces — Government Proceedings Ordinance, 1956, s. 14.

The respondent who was a member of the armed forces, met with an accident while travelling in a vehicle driven by Mohamed bin Hussin, also a member of the armed forces. The vehicle collided with a lorry coming from the opposite direction. The respondent sued for damages against Mohamed